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CASE NO. 87-250

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MANUEL L. REAL, CHIEF JUDGE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,

Petitioner,

v.

STEPHEN YAGMAN,

Respondent,

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI

MARK E. BECK
BECK & DE CORSO
A Professional Corporation
811 West Seventh Street
11th Floor
Los Angeles, California 90017
(213) 688-1198
Counsel of record for Respondent
Michael Baden

HARVEY A. SCHNEIDER
A PROFESSIONAL CORPORATION
5850 Canoga Avenue, 4th Floor
Woodland Hills, CA 91367
(818) 702-0204
Counsel of record for Respondent
Sidney Weinberg

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I.

INTRODUCTION

Respondents (real parties in interest) Sidney Weinberg, M.D., and Michael Baden, M.D., join Petitioner in urging the Court to grant certiorari in this case. Respondents concur with the reasons set forth in the Petition, and offer the following additional reasons

for granting certiorari.

II.

STATEMENT OF REASONS

A. The Ninth Circuit's Reassignment Of This Case Hinders The Policy Of Sanctioning Frivolous, Bad Faith Litigation.

This Court has stated that sanctions are an appropriate method of punishing attorneys who vexatiously abuse the process of the courts. Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). Additionally, Congress modified Federal Rule of Civil Procedure 11 in 1983 to clarify the propriety, indeed the duty, of sanctioning frivolous, bad faith litigation. Nevertheless, the Ninth Circuit undercut this significant policy supporting the use of sanctions by ordering reassignment of a judge who

took seriously the misconduct of an obstreperous attorney and the court's duty to respond.

This Court must make a clear statement preserving the authority of judges to impose appropriate sanctions in these circumstances. Such a statement would be consistent with the policies already set forth by both Congress and this Court.

This Court will seldom encounter a case in which an attorney's misconduct is so well documented over such a prolonged period. This case therefore presents an ideal opportunity to identify types of conduct which federal practitioners must avoid and which the federal bench will not tolerate.

Given the heavy case load federal judges are currently managing, and the often staggering cost engendered by frivolous, bad faith litigation, this opportunity to address the power of

federal judges to sanction parties and their counsel is one which must not be allowed to pass.

B. Reassignment Will Encourage Improper Attacks Upon Judges.

Counsel of the sort who was sanctioned in this case should not be encouraged to bootstrap the transfer of a case by making slanderous attacks against judges who acted within their authority, but in a manner unwelcomed by counsel. If a judge can be removed from a case through no fault of his own, but due only to the contempt shown him or her by counsel:

> We will be opening a "Pandora's box" for countless baseless attacks upon a defenseless judiciary whose independence is essential to the preservation of this republic. To encourage requests for remands to another judge, would also encourage

> indirect judge shopping, and libelous or slanderous statements directed against both trial and appellate judges. (Emphasis in original.)

Koller By and Through Koller v. Richardson-Merrell, 737 F.2d 1038, 1069 (D.C. Cir. 1984) (Richey, J., concurring), vacated and remanded sub nom. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985).

This Court must send a message to all attorneys, particularly those who have no compunction about stepping outside the bounds of proper zealous advocacy, that the right and duty of federal judges to control the conduct of attorneys who appear before the court may not be undermined or circumvented by vicious attacks upon their integrity.

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C. Reassignment Deprives Injured Parties Of The Judge Best Able To Assess The Nature And Degree Of The Offending Attorney's Misconduct.

This Court also should grant certiorari to avoid manifest unfairness to injured parties. The Ninth Circuit's reassignment order would serve as a dangerous precedent which removes from sanctions hearings the only judges properly familiar with an attorney's misconduct and with the pre-trial and trial records generally. Such removal precludes the most complete and accurate appraisal of the offending attorney's misconduct, thereby denying the injured parties a proper hearing upon their claims for sanctions.

Most importantly, the cold record of the trial transcript often cannot begin to do justice to the variety and severity of attorney misconduct made the subject of a sanctions motion.

Consideration of the tone of counsel's voice and the mannerisms which mark his courtroom behavior are crucial to a proper evaluation of sanctionable behavior. As a result, the trial judge is in a unique position to evaluate the egregious nature of attorney trial misconduct.

In situations, as here, where the Ninth Circuit itself has said it has no doubt the trial judge would be fair and impartial upon remand, it is particularly inappropriate to deprive the injured parties of the judge who is best equipped to rule upon their motion for sanctions.

II.

CONCLUSION

It is not unusual for a trial judge and counsel to become embroiled in disputes during the course of

litigation. This is particularly true where, as here, counsel baits and provokes the trial court through repeated misconduct and lack of preparation. However, if every case involving conflict between a trial judge and counsel warranted the removal of the judge because "the fragile appearance of justice has taken a beating," Matter of Yagman, 796 F.2d 1165, 1188 (9th Cir. 1986), the resulting waste of judicial resources and damage to the integrity of the judicial system would be considerable.

Moreover, there is something most unseemly about a circuit court, in effect, taking the side of an ill-mannered and undisciplined attorney in his dispute with a federal trial judge.

Based on the foregoing, it is requested that this Court grant the Petition for Certiorari. The standards for reassignment of judges must be

further defined, the duty of federal judges to use sanctions to control attorneys in federal court must be affirmed, and any notion that a judge can be removed from a case due to his justified response to attorney misconduct must be extinguished.

Dated: September 8, 1987

Respectfully submitted,

HARVEY A. SCHNEIDER
A PROFESSIONAL CORPORATION

MARK E. BECK
BECK & DE CORSO
A Professional Corporation

By _____
MARK E. BECK
Attorneys for Respondents
SIDNEY WEINBERG, M.D. and
MICHAEL BADEN, M.D.

CERTIFICATE OF MAILING

I hereby certify that on this date I have place in the United States mail, postage prepaid, a true copy of the above document addressed as follows:

Donald C. Smaltz, Esq.
Morgan, Lewis & Bockius
801 South Grand Avenue
Twenty-Second Floor
Los Angeles, CA 90017

Frederick D. Friedman, Esq.
O'Neill & Lysaght
2115 Main Street
Santa Monica, CA 90405

Ramsey Clark, Esq.
113 University Place
New York, New York 10003

(continued on next page)

Stephen Yagman, Esq.
Yagman, & Yagman, P.C.
10880 Wilshire Blvd.
Suite 1900
Los Angeles, CA 90024

Dated: September 8, 1987

Respectfully submitted,

HARVEY A. SCHNEIDER
A PROFESSIONAL CORPORATION

MARK E. BECK
BECK & DE CORSO
A Professional Corporation

By _____
MARK E. BECK
Attorneys for Respondents
SIDNEY WEINBERG, M.D. and
MICHAEL BADEN, M.D.